

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35653(KRH)
.
.
CIRCUIT CITY STORES . 701 East Broad Street
INC., . Richmond, VA 23219
.
Debtor. . January 29, 2009
. 10:06 a.m.

TRANSCRIPT OF HEARING and BENCH RULING
BEFORE HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: All rise. The United States Bankruptcy
2 Court for the Eastern District of Virginia is now in session.
3 The Honorable Kevin R. Huennekens presiding. Please be seated
4 and come to order.

5 The matter of Circuit City Stores, Incorporated, case
6 number 0835653. Hearing on items one through nineteen as set
7 out on debtor's amended agenda.

8 MR. FOLEY: Good morning, Your Honor, Doug Foley with
9 McGuireWoods on behalf of Circuit City. With me at counsel
10 table is Gregg Galardi from Skadden Arps as well as Kellan
11 Grant from Skadden Arps.

12 Your Honor, one thing that we would like to address
13 with the Court first that's actually not on the agenda. Mr.
14 Englander is here on behalf of Alliance Entertainment, LLC.

15 Alliance is a -- holds -- claims to hold a
16 warehouseman's possessory lien over certain inventory that we
17 own, DVDs, video games, and the like in their warehouses.
18 Under the final DIP order they got preservation of their rights
19 with respect to whatever that lien may turn out to be.
20 Everybody reserved rights to challenge it later.

21 The problem is we have a lot of goods that are in
22 their possession. We would like to have those released to get
23 to the store so that it could be sold as part of the sale
24 process.

25 And Alliance obviously wants adequate protection with

1 respect to whatever their lien rights are. The amount that
2 they are owed that they claim to have a possessory lien against
3 our goods is \$1,028,153.34.

4 And what we've agreed is we're working on language of
5 a consensual stipulation establishing adequate protection for
6 this warehouseman's lien that would provide that that amount of
7 money from the sale proceeds of the sale that's ongoing would
8 be segregated by the debtors in a bank account later with
9 everybody reserving their rights with us with respect to
10 whether or not the value of the goods that were sold didn't
11 meet that amount, with respect to the bank saying they defeat
12 their lien in a priority dispute.

13 But the money is set aside and that -- once it's set
14 aside and once you know we announce that some --

15 THE COURT: The lien would attach to the proceeds.

16 MR. FOLEY: Whatever it is, it would attach to the
17 proceeds. And he can go make a phone call so that those goods
18 can start to ship right away because time is really of the
19 essence to get these goods into the stores.

20 And the bank's counsel is here. They're not going to
21 be a party to the stipulation but they have acknowledged it and
22 they don't have an objection to the protocol that we have
23 established and same is true with the committee counsel I
24 believe, Your Honor.

25 THE COURT: All right. Mr. Englander.

1 MR. ENGLANDER: Yes, Your Honor. Because of the time
2 sensitivity the stipulation is going to be coming over the next
3 several days we hope. But assuming the Court will excuse me as
4 we're finished with this portion of the hearing, I will make a
5 phone call and let my client know that they should take the
6 goods that are now on the docks and ship them as quickly as
7 possible.

8 But one of the things I do want to make clear is that
9 the lien is going to be preserved despite the fact that we're
10 shipping before the stipulation is finalized and entered. This
11 is the replacement lien and proceeds.

12 THE COURT: I understand exactly what you're saying
13 and that's a sensible resolution it seems to me.

14 MR. ENGLANDER: All right.

15 THE COURT: Let me hear from Ms. Beran.

16 MS. BERAN: Good morning, Your Honor. For the record
17 Paula Beran on behalf of the Official Committee of Unsecured
18 Creditors. In addition, Your Honor, Mr. Robert Feinstein is on
19 the line this morning representing the committee as well.

20 This matter was brought to the committee's attention
21 late yesterday. While the professionals of the committee do
22 believe that this is a wonderful idea in concept, we have not
23 had the opportunity to review any of the documents.

24 We do appreciate the party's efforts in coming up
25 with this resolution. But nonetheless given the short time

1 period we have not been able to digest and obtain committee
2 support so we're not able to stand before Your Honor this
3 morning to either support it or object to it.

4 THE COURT: Okay. Very good. Well obviously the
5 Court hasn't looked at the documents either because I
6 understand there are no documents. But I understand the
7 concept. The concept makes good sense to me and so I will
8 approve that provisionally and look forward to receiving the
9 stipulation.

10 MR. FOLEY: We'll submit that later today, Your
11 Honor. There's one other item that wasn't on the agenda.

12 MR. ENGLANDER: Your Honor, may I be excused?

13 THE COURT: You may be excused. Thank you, sir.

14 MR. ENGLANDER: Thank you very much, Your Honor.

15 MR. FOLEY: One other item that's not on the agenda,
16 Your Honor, is we did submit a proposed order extending the bar
17 date for the Canadian Monitor in the Canadian proceeding with
18 respect to our case.

19 MR. GALARDI: It's the Canadian debtor not the
20 monitor but he was here before.

21 MR. FOLEY: Okay.

22 MR. GALARDI: Your Honor, if I may?

23 THE COURT: Yes.

24 MR. GALARDI: As you are aware there is a Canadian
25 proceeding going on and one of the affiliated companies of the

1 debtors is in bankruptcy.

2 At the request of the monitor who is not in control
3 of that entity but is charged with protecting the creditors of
4 the Canadian entity, they had asked for an extension of the bar
5 date.

6 We had submitted a stipulation that extended that bar
7 date. I don't know if Your Honor will get a chance to sign and
8 approve it, but tomorrow is the bar date so I wanted to make it
9 clear that even if the order is not entered by tomorrow, Your
10 Honor, we've agreed to extend the bar date as set forth in that
11 stipulation.

12 We -- Mr. Hedgebeth (phonetic) who is in the
13 courtroom is on behalf of a U.S. debtor acting as the
14 shareholder for Canadian entity, authorized that Canadian
15 entity to have a longer bar date.

16 And again it's just in case of inter company claims
17 between the States and Canada. That stipulation was worked out
18 with monitor's counsel. Our Canadian counsel approved it. And
19 so I just wanted to make sure on the record that we've agreed
20 to extend that bar date regardless of whether that order
21 happens to get entered by tomorrow or not.

22 And counsel for the monitor is in the courtroom today
23 and it's not on the agenda.

24 THE COURT: Okay. Has that order been tendered to me
25 at this point?

1 MR. GALARDI: I think it was tendered yesterday, Your
2 Honor.

3 THE COURT: Okay. So I should be able to get that
4 entered today without any problem. But I understand the point
5 that you're making.

6 MR. GALARDI: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. SMITH: Good morning, Your Honor, J.R. Smith on
9 behalf of the Canadian monitor. Mr. Galardi is correct and we
10 would ask the Court to consider the order that's been submitted
11 consensually and to expedite its consideration and approval as
12 soon as possible.

13 THE COURT: I should be able to get that entered as
14 soon as we're done with our proceedings today.

15 MR. SMITH: Thank you, Your Honor.

16 MR. FOLEY: Thank you, Your Honor. Sorry for the
17 distraction there off of the agenda. We can now go to the
18 items that are listed on the agenda.

19 Your Honor, item number one is a motion by CCD, St.
20 Mary, and Popolio (phonetic) with respect to compulsion of
21 payment of certain post-petition rent. We've settled up with
22 them on their post-petition obligations and we've paid them.

23 That matter is resolved and can be removed from the
24 docket.

25 THE COURT: All right.

1 MR. FOLEY: Your Honor, the same is true with the
2 next motion, item number two, which is the motion of Cole CC
3 Town MALC for compelling payments under 365(d)(3). I believe
4 Mr. Condyles is here. That has also been settled up and paid.

5 THE COURT: All right. Mr. Condyles.

6 MR. CONDYLES: That's correct, Your Honor. We've
7 reached an agreement on that.

8 THE COURT: All right. So that will be resolved as
9 well.

10 MR. FOLEY: Your Honor, item number three, this is
11 also a similar motion by Cottonwood Corners Phase V, LLC for an
12 order compelling payment under 365(d)(3) and 503(b). We have
13 resolved the payment issue there on post-petition rent and that
14 has -- that can be removed from the docket.

15 THE COURT: All right.

16 MR. FOLEY: Your Honor, item number four is again our
17 motion to establish sale down procedures for trading and equity
18 securities. This may ultimately become moot but it's not yet
19 so we would ask the Court to adjourn that until the next
20 hearing on February 13th, Your Honor, at 10:00.

21 THE COURT: Okay.

22 MR. FOLEY: Your Honor, item number five. Mr.
23 Schwarzschild is here. There is a couple remaining objections
24 to a lease rejection motion that we had our first hearing on by
25 Golf Galaxy, Dick's Sporting Goods and Dollar Tree stores.

1 I believe they were trying to work out new
2 arrangements with the over landlord. These were subleases that
3 were rejected. And they ask that we continue this matter,
4 their objections until the February 13th omnibus hearing date
5 and possibly farther.

6 In fact I believe we have a hearing on March 3rd,
7 Your Honor, and if -- I did not know what date that was when we
8 were discussing it yesterday, but if Mr. Schwarzschild wants
9 the March 3rd date, we're fine with that as well.

10 MR. SCHWARZSCHILD: That's fine with us, Your Honor.
11 Thank you.

12 THE COURT: March?

13 MR. FOLEY: March 3rd is the next hearing date.

14 THE COURT: March 3rd will be the date then. Okay.

15 MR. FOLEY: Your Honor, item number six is a motion
16 that was continued from the last hearing by Engineered
17 Structures. I believe we have one issue left that we have to
18 deal with? Okay.

19 MR. PETCHER: Your Honor, we've actually agreed to a
20 pair of consent orders that we've submitted to Your Honor, one
21 of which would lift the stay to allow a foreclosure action to
22 proceed as to the two closed stores.

23 The other is a temporary solution which allows for
24 ESI to file, service, and post a lis pendens in California with
25 respect to the two stores that are still operating.

1 We've agreed, the parties have agreed to allow that
2 to happen with the condition that nothing further will happen
3 until we either resolve the issues relating to the scope of the
4 stay and whether ESI can proceed further or it becomes moot by
5 some other reason.

6 The only reason -- one thing I would ask, Your Honor.
7 The deadline for the first of those lien foreclosures is Monday
8 so we would just simply ask that if possible if you would be
9 able to at least take a look at those orders to ensure that we
10 have something on the record so we can proceed with those by
11 Monday. Is that -- do you think that would be possible?

12 THE COURT: Have those orders been submitted to me?

13 MR. PETCHER: Yes, Your Honor, one of them was
14 submitted on Wednesday and -- I'm sorry -- Tuesday and the
15 other one was submitted yesterday, Your Honor.

16 THE COURT: I'll certainly take a look at those.

17 MR. PETCHER: Okay. Thank you.

18 THE CLERK: Could I get your name for the record
19 please?

20 MR. PETCHER: Oh, I'm sorry. It's Rhett Petcher for
21 Engineer Structures, Inc. One other thing on the orders, Your
22 Honor. The parties agreed to continue the remaining of the
23 issues until the next hearing which is February 13th so the
24 other issues raised we'd ask to continue those until the next
25 hearing.

1 THE COURT: That was my understanding.

2 MR. PETCHER: Okay.

3 THE COURT: Thank you.

4 MR. FOLEY: Thank you, Your Honor. Item number seven
5 is the next item on the agenda. This is also a motion by
6 Motorola for allowance and payment of an administrative claim
7 under 503(b)(9). They have agreed to adjourn this matter until
8 the February 13th docket date.

9 Your Honor, similarly item number eight which is the
10 motion of General Instrument Incorporation doing business as
11 Home Networks Mobility business of Motorola, Inc. for allowance
12 and payment of an administrative claim under 503(b)(9).

13 They have similarly agreed to adjourn this matter
14 until the February 13th omnibus hearing date.

15 Your Honor, item number nine is our motion to approve
16 a settlement with IBM Corporation. The committee has asked for
17 additional time to review the terms of that settlement and so
18 we've agreed to adjourn that matter until the February 13th
19 omnibus hearing date.

20 THE COURT: All right.

21 MR. FOLEY: Your Honor, item number ten is a motion
22 for relief from stay by Plum Choice. They originally asked for
23 an expedited hearing. But in talking to them we're going to
24 try to see if we can work through their issues and reach a
25 resolution before the February 13th omnibus hearing date.

1 And based upon that representation to try to resolve
2 the matter they've agreed to adjourn the matter until the
3 February 13th hearing date as well.

4 THE COURT: All right.

5 MR. FOLEY: Your Honor, item number 11, this is the
6 motion of Federal Warranty Services Corp. to compel assumption
7 rejection of the Assurant agreement.

8 This one has some relationship to the Greystone
9 adversary proceeding that's also on for the 13th. They've
10 agreed to adjourn this matter until the February 13th omnibus
11 hearing date.

12 THE COURT: All right.

13 MR. FOLEY: Your Honor, I'm going to skip 12 for a
14 moment because Mr. Grant is going to address the Court on
15 number 12 and number 14. Number 13, Your Honor, is our motion
16 to approve a settlement with Verizon.

17 We have agreed to continue that matter until the
18 February 13th hearing date. I'll just --

19 MR. GALARDI: Yes, let me just --

20 MR. FOLEY: Okay.

21 MR. GALARDI: Your Honor, it's a little more tricky
22 than that. Your Honor, we passed over -- again for the record
23 Gregg Galardi. Your Honor, with respect to -- this is somewhat
24 related if you've read the papers, and I'm sure you have, to
25 the Plum Choice matters and we've skipped over Plum Choice and

1 I believe Plum Choice yesterday filed a large administrative
2 claim.

3 So what we had requested Verizon to do was in light
4 of that to move this over to February 13th. Unfortunately
5 Verizon's counsel could not get to their client since the
6 events. So it's not an agreement.

7 We're going to seek to move it over to the 13th.
8 They do not contest that, but they can't say that they've
9 consented to it. So I didn't want it to be an agreement. They
10 were specific about that because they haven't reached the
11 counsel.

12 There is no deadline by which we had to have that
13 settlement approved so we don't think it puts the settlement.
14 We just wanted to evaluate it in light of the Plum Choice
15 motion, the Plum Choice claim because they are rather related.

16 So we've asked to move that over to the 13th.
17 They've not agreed, but they don't object.

18 THE COURT: All right. Very good. It will be set
19 for the 13th then.

20 MR. GALARDI: Thank you, Your Honor.

21 MR. GRANT: Good morning, Your Honor, Kellan Grant
22 for the debtors. I'm just going to address items 12 and 14.

23 Twelve involves a lease that we originally were going
24 to reject. It had a sublease under it. The over landlord
25 requested that instead we let them purchase the lease so we

1 filed a motion to assume the assign.

2 The subtenant subsequently objected and wanted to put
3 in a counteroffer. Since that time those two parties have
4 worked together and the objection is withdrawn.

5 THE COURT: All right.

6 MR. GRANT: Item 14 is the motion on Mansfield for
7 relief from stay. This involves a tenant allowance under a
8 lease where we built a building.

9 Pre-petition the building was finished and the tenant
10 allowance came due. There is some dispute about whether it
11 really was payable in light of events, the upcoming rejection,
12 the fact that there were liens against the property.

13 So we've reached a resolution and we'll submit an
14 order that basically nets out the allowance with claims of the
15 landlord and liens and we will convey the property.

16 There's some question of the ownership of the
17 building. The order will provide that we convey that building
18 to Mansfield as well.

19 THE COURT: All right. Very good.

20 MR. GRANT: Thank you, Your Honor.

21 MR. FOLEY: Your Honor, if we could drop down for a
22 moment over the number 15, Mr. Galardi will address the items
23 on the remainder of the docket and then we could come back to
24 number 15, Your Honor.

25 THE COURT: All right. That will be fine, Mr. Foley.

1 MR. GALARDI: Your Honor, moving to 16 and 17. As
2 Your Honor may recall the approval of the Protivity (phonetic)
3 and the Jeffries (phonetic). Your Honor, in light of the
4 company's store closing procedures I had expressed a concern
5 about continuing professionals.

6 I'm pleased to say that we're continuing to work with
7 the committee regarding budgets, financials, and do that. What
8 I would ask for is on that same issue, although I think I have
9 a proposal I don't think we have formalized it and there may be
10 some other lingering issues that we're going to meet and talk
11 to the committee with I think as early as tomorrow.

12 What I'd ask to do is to simply put this over to
13 February 13th. I haven't said this to Mr. Feinstein who's on
14 the call. What we'd do is put it over to February 13th. We
15 did have a February 5th date in our sort of agreement that we
16 may have Jeffries only extend to February 5th, but I did want
17 to talk to him about that in light of the Canadian sale
18 process, the IP sale process, and Jeffries continuing role in
19 how we come up with a wind down budget for this company.

20 So I think -- I'll spring it on Mr. Feinstein on the
21 phone -- but if that's acceptable I'd assume we could put this
22 over to February 13th to continue to work cooperative on that
23 issue.

24 THE COURT: All right. Very good. Mr. Feinstein, do
25 you have any objection to carrying this over to the 13th of

1 February?

2 MR. FEINSTEIN: No, Your Honor, that's fine with us.

3 THE COURT: All right. Very good. Thank you, sir.

4 All right. That will be carried over to -- that's number 16?

5 MR. FOLEY: And 17.

6 MR. GALARDI: And number 17 yes, Your Honor.

7 THE COURT: Okay. Both of those will be carried over
8 to the 13th of February.

9 MR. GALARDI: Thank you, Your Honor. Your Honor,
10 number 18 is as Your Honor received we had had a motion by
11 Chase which is our private label credit card company to
12 expedite a hearing to have us reject or terminate the
13 agreement.

14 We filed an opposition to that and frankly we hadn't
15 gotten our after the one week of which has had a lot of flurry
16 of activity, hadn't understood exactly what the implications
17 were.

18 We have agreed with Chase to put that over to the
19 February 13th hearing so that we can assess it and see if we
20 can reach a consensual resolution. If we're unable to do so
21 then we'll be before Your Honor on that motion on February
22 13th.

23 THE COURT: Mr. Condyles, do you wish to be heard on
24 that?

25 MR. CONDYLES: Yes, sir, if I may. Michael Condyles

1 on behalf of Chase Bank, USA.

2 Your Honor, just to give a little color to this, we
3 did ask for an emergency hearing on this. And to put some
4 flavor into what we're addressing from Chase's side that
5 resulted in the request.

6 Chase has issued the private label and cobranded
7 credit cards for Circuit City and that constitutes
8 approximately a \$3 billion credit card portfolio that they have
9 outstanding so it's no insignificant sum to Chase.

10 Now the cobranded cards and the private label, what
11 are they? Well when you go into Circuit City and you get your
12 ten percent off if you get a Circuit City card that has their
13 label on it and you can use it only there, that's the private
14 label.

15 Cobranded is your Visa card that has a Circuit City
16 label on it but you can use it anywhere including Circuit City.

17 So there are substantial amounts that are in this
18 portfolio and there are substantial obligations that Chase has
19 under the existing credit card program agreement.

20 In light of the liquidation there's no conceivable
21 way that that program agreement can be assumed by the debtor
22 under its terms or otherwise, but there are significant
23 obligations that Chase has including the maintaining of a call
24 center with 600 employees down in Kennesaw, Georgia,
25 maintaining a management staff here, and so forth.

1 So we were to us it's very important that we get
2 before the Court immediately. We did give deference to the
3 request of the debtor to give it more opportunity to review
4 this document.

5 But we want to emphasize the necessity to go forward
6 on the 13th one way or another. So I just wanted to put some
7 color to this for the Court's benefit and --

8 THE COURT: So that's a long way of saying you're in
9 agreement?

10 (Laughter)

11 MR. CONDYLES: We are in agreement.

12 THE COURT: Okay.

13 MR. CONDYLES: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. GALARDI: And, Your Honor --

16 THE COURT: And we'll hear it by the 13th.

17 MR. GALARDI: And, Your Honor, again I was trying to
18 be short. We obviously have a disagreement about a lot of
19 those things that are said so that's why we thought it would be
20 important to put it on the 13th.

21 Your Honor, number -- so we would -- a short way to
22 say number 18 is adjourned to February 13th.

23 Your Honor, number 19 is a motion of the Assurant
24 Companies. Again there's been an agreement of asking for an
25 extension of that time to February 13th as well and the parties

1 have agreed to adjourn that.

2 THE COURT: All right. Mr. Smith, do you wish to be
3 heard on that?

4 MR. SMITH: For the record, Your Honor, J.R. Smith on
5 behalf of Federal Warranty Service Corporation and related
6 Assurant Companies. What Mr. Galardi said is correct. Thank
7 you, Your Honor.

8 THE COURT: Okay. Very good. So we'll carry number
9 19 over to February 13 as well.

10 MR. GALARDI: Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Galardi.

12 MR. FOLEY: Your Honor, before we get to the Funches
13 lift stay matter which we're going to go forward on, as Your
14 Honor is aware we contacted chambers about another hearing date
15 that we may need between February 13th and March 3rd.

16 And obviously everybody doesn't need to stick around
17 for the Funches relief from stay matter, but everybody may want
18 to know, who's in the courtroom, may want to know if Your Honor
19 has some time available the week of February 23rd if we could
20 get on the calendar for that.

21 MR. GALARDI: And, Your Honor, to give some color,
22 one, you notice that we've had a number of adjourned matters;
23 two, we anticipate as the liquidation of the stores go for
24 example we're going to have lease matters so Your Honor is very
25 familiar with the number of landlords that have come.

1 The 13th may be a little tight. We hope to file
2 motions probably by February 2nd, 3rd, and 4th on various
3 matters. So we sort of picked that 23rd, 24th to try to get 20
4 or more -- close to 20 days notice.

5 So anywhere in that time frame would be very helpful
6 for us to schedule some matters and they probably couldn't wait
7 until March 2nd because lease rejections and the accrual method
8 and other matters it makes sense to have in that time period.

9 I hate to burden you with another hearing there, but
10 that's sort of where we're thinking. Not only what we just
11 adjourned, I know there will be some contested matters and
12 landlord matters which I think takes up a significant time on
13 the docket.

14 THE COURT: All right. Well the Court's calendar is
15 tight that week but we'll make it happen. I can do the
16 afternoon on Wednesday the 25th beginning at 2:00. Would that
17 work?

18 MR. FOLEY: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. FOLEY: Other than the Funches relief from stay
21 matter I think that concludes everything that we wanted to
22 address the Court today.

23 THE COURT: All right.

24 MR. FOLEY: Your Honor, Ms. Hudson and I have talked
25 about some stipulations and stipulated exhibits which I think

1 will cut down on the hearing quite a bit.

2 Your Honor, Ms. Hudson has asked that I read the
3 stipulation into the record and then there's three related
4 exhibits that are uncontested that we can hand up to the Court
5 as well.

6 THE COURT: All right.

7 MR. FOLEY: As Your Honor is aware this motion for
8 relief from stay has to do with a request to seek to be able to
9 go after insurance proceeds. Part of the issue that reasonably
10 ask -- are going to ask the Court to deny the motion is because
11 of the way the deductible and self insured retention works
12 under our insurance program.

13 But, Your Honor, the stipulated facts that we wanted
14 to bring to the Court's attention is that our general liability
15 policy for the year in question is with Old Republic Insurance
16 Company, the policy number is MWZY55973, the coverage for each
17 occurrence is \$1.5 million, the deductible including allocated
18 loss adjustment and expenses is \$1.5 million, and the self
19 insured retention exists including allocated loss adjustment
20 expenses is \$500,000.

21 The second issue that we stipulated on factually,
22 Your Honor, is that Circuit City has expended approximately
23 \$326,000 in costs of defense with respect to this litigation to
24 date that would go against the self insured retention of
25 \$500,000.

1 Your Honor, we have also stipulated to the fact that
2 there are several lawyers of excess insurance. And the
3 schematic that I'll be showing the Court lays it out, but I'll
4 read into the record the different layers.

5 Your Honor, after the first \$2 million, again which
6 is Circuit City's expenditure, we have National Union Fire
7 Insurance Company which is the primary excess carrier for the
8 next \$25 million, we have Liberty Mutual Insurance Company
9 which is the first layer after the primary of excess for \$50
10 million, we have Fireman's Fund Insurance Company which is the
11 next excess layer for \$25 million, we have American Guarantee
12 and Liability Company for the next \$50 million, and Ohio
13 Casualty Insurance Company for the next \$25 million.

14 Your Honor, we have also stipulated to the fact that
15 as part of this litigation Circuit City made a demand against
16 one of the other defendants insurance carriers Thompson, who's
17 the manufacturer of the television in question, to defend us
18 under indemnity obligation.

19 They declined, their carrier declined to take up the
20 defense of the matter so we had to file a DEC action in same
21 court that's pending as a separate proceeding to recover our
22 cost of defense that has been expended against Thompson's
23 insurance carrier. And we have a copy of that particular
24 complaint that we will submit as a stipulated exhibit.

25 Your Honor, we have also agreed as part of narrowing

1 the presentation of evidence here today that we will provide
2 copies of the excess liability policies that I just mentioned
3 to counsel for the Funches by February 6th provided that it's
4 done so under a suitable confidentiality agreement.

5 Did I read it right?

6 MS. HUDSON: Good morning, Your Honor, Lisa Hudson
7 here on behalf of the Funches and the Olloways.

8 The only addition I have is under the fifth
9 stipulation, the dec action with Thompson over the
10 indemnification and defense between the two codefendants.

11 Thompson actually did handle defense for two years
12 from 2006 to 2008 in the case and then stopped and that
13 precipitated the dec action filed.

14 But with that exception the complaint and all of its
15 exhibits and the schematic that Mr. Foley mentioned and I
16 believe a self insured retention excerpt are the exhibits or
17 documents that we stipulate on the admissibility of today.

18 THE Court: All right. Thank you, Ms. Hudson.

19 MR. FOLEY: Your Honor, I'll hand the exhibits up at
20 this point.

21 THE Court: This is three copies of the same thing,
22 Exhibit A.

23 MR. FOLEY: Yes, I have one for the law clerk and one
24 for the Court and then -- Your Honor, what that is is a
25 schematic obviously that shows, it graphically depicts what I

1 just read to you as part of the stipulation.

2 The column that you should look at for purposes of
3 this is general liability which is the second column and then
4 go up. You'll see the 500 shaded in orange, that's the 500
5 self insured retention.

6 And then you see a green box that says Old Republic
7 Insurance Company 1.5 million. That's the essentially the GL
8 fronting that Old Republic is doing but that's our deductible
9 too.

10 And then when you get to the yellow that's when the
11 actual real insurance kicks in.

12 The next exhibit, Your Honor, is Exhibit B. This is
13 an endorsement to the Old Republic policy that sets forth the
14 \$500,000 self insured retention.

15 Your Honor, the second page of that document shows
16 the dollar amount for the self insured retention.

17 The last exhibit, Your Honor, is the complaint that
18 Ms. Hudson referenced with respect to the declaratory judgment
19 action.

20 MS. HUDSON: And, Your Honor, this complaint has just
21 a portion of the exhibits, but the complaint is complete.

22 THE COURT: Thank you, Ms. Hudson.

23 MR. FOLEY: Your Honor, we would ask that all those
24 exhibits be admitted into evidence.

25 THE COURT: They will be admitted as Exhibits A, B,

1 and C that were handed up.

2 MR. FOLEY: Okay. With that I don't know that we
3 have any -- the debtors don't have any additional evidence,
4 Your Honor, at this point.

5 THE COURT: All right. Thank you, Mr. Foley.

6 MS. HUDSON: Thank you, Your Honor. Again Lisa
7 Hudson here on behalf of I'll just short circuit and say the
8 Funches and the Olloways, the movants today. And I'm here with
9 Lorna Propes from Illinois who is lead counsel for the Olloway
10 family. She flew in for this hearing today.

11 I think Your Honor knows from the preliminary hearing
12 that this is a state court case of wrongful death and something
13 called survival claims unique to Illinois regarding products
14 liability and strict liability and negligence involving a
15 September 24th house fire at the Funches's home.

16 And a suit was filed in 2005 first by the Funches
17 family and then later joined by Olloway just as we have done in
18 this motion for relief from stay proceeding that killed four
19 children. Three children in the Funches family, one child in
20 the Olloway family.

21 And that case was filed in March 2005 so it's four
22 years and going. The TV was manufactured by one of the
23 defendants Thompson. It was sold by Circuit City and serviced
24 by Circuit City. And those defendants are Thompson, Circuit
25 City, and RCA.

1 And the City of Chicago is also a defendant because
2 of a 911 call that was made and hung up on thinking that it was
3 a prank. And so as a result we have the four deaths and it is
4 a joint and several liability case amongst those defendants and
5 Ms. Propes will be able to explain that far better than I can.

6 But Illinois has a unique creature in their joint and
7 several liability that as long as you have 25 percent liability
8 against any -- against all of the defendants you can choose
9 which of the defendants you recover against. So it is a
10 different creature than what we have here.

11 And it is a jury trial and there has been extensive
12 discovery. And again she will testify to that today.

13 But movants come forward today to say that this is
14 not a core proceeding because under 28 U.S.C. 157 this is the
15 wrongful death carve out that Congress has for tort action or
16 wrongful death and it's not appropriate for those type matters
17 to be tried in bankruptcy court.

18 Those matters should be liquidated and brought to
19 judgment in a tribunal like the state court or in a district
20 court here or a district court there. But this Court has
21 discretion to abstain and allow it to stay in the state court
22 where it's been proceeding for four years and then it would
23 come back to this Court in terms of the scheme for collection
24 on that claim.

25 But to try to put this into the context of a 502

1 proceeding or some sort of claims objection process is not
2 appropriate because Congress has mandated that this Court
3 doesn't liquidate that claim.

4 So that's what is at issue today and of course the
5 insurance would come into play at the collection standpoint,
6 not at the standpoint of liquidating this actually to a sum
7 certain or a judgment.

8 And there will be probably argument about the cost to
9 the debtor here in liquidation to defend this, but case law is
10 very clear that unless you have something of the mega realm of
11 10,000 cases or 25,000 cases or 50,000 cases, and you've got an
12 arsenal of attorneys, and you have management involved, and you
13 have extensive review and a huge litigation team, that those
14 defense costs aren't at that nature of prejudice in the
15 balancing test. And I will speak to that in a moment.

16 But we do have a stipulation that \$326,000 has been
17 exhausted and if you divide that by the years we're at I think
18 about 62 grand a year.

19 And I guess significantly yesterday morning I got the
20 ABI blog on my computer that says debtor's counsel's earning
21 \$18.50 a minute in this case. So putting it all in perspective
22 \$60,000 a year, I'm not making light of that figure, but that
23 is not the kind of prejudice that Congress spoke of in 157 and
24 it's not the kind of prejudice in case law for merely having to
25 defend a matter.

1 So I want to be clear that we are backing away from
2 our original relief sought in the motion for relief. We're not
3 seeking to collect, we are just seeking to reduce the claim to
4 a judgment amount and have this Court abstain in its discretion
5 and allow this to continue before Judge Egan.

6 This Court has entered a comfort order previously to
7 educate Judge Egan that the stay did not apply to non debtors
8 and unfortunately that's still a confusion in that court.

9 The City of Chicago doesn't want to learn that and
10 doesn't want to accept that and wants to ride the bandwagon of
11 the stay. And I believe there's even another hearing tomorrow
12 in that regard. And again I'm going to need to defer to Ms.
13 Propes to give the Court a status update there.

14 But we are not seeking to collect, we are just
15 seeking to reduce the judgment. And we had tried and
16 represented to Your Honor at the preliminary hearing that we
17 were going to have this judicial recusal hearing and we were
18 going to have some major things in the litigation that didn't
19 really affect everyone and have cost carved out and possibly
20 try to resolve things and maybe have some destructive testing
21 and inspection of the artifacts from the fire.

22 Those negotiations unfortunately broke down in light
23 of the liquidation and because debtor's argument is that the
24 costs are significant there. But today Ms. Propes will be able
25 to testify that those costs aren't significant, it will be

1 videotaped, they don't need to have an expert or an attorney
2 there.

3 But once you undo the beast and pop the back off and
4 blow fuses or cut into things it can't be undone and we can't
5 even go against non debtor parties in a way that would
6 prejudice or spoil -- or have a spoliation claim.

7 So at a minimum we have to be allowed to the extent
8 that the stay still applies to do that destructive testing.
9 And all parties have agreed that April 1st, 2nd, and 3rd could
10 be carved out for that and the cost associated for that we
11 would even be willing to pay at the facility and all the
12 evidence would be digital so it could be later ordered by
13 Circuit City if there would be a need in their defense in the
14 litigation.

15 So with that in mind we have filed this motion for
16 relief. It was on an expedited basis. We did have those carve
17 outs. And today we come to the Court seeking those two things,
18 the ability to proceed with that inspection of artifacts which
19 is the TV and various other appliances in the Funches's home
20 which is now destroyed, and to proceed in the litigation in
21 Cook County circuit court which has been going on since 2005
22 before Judge Egan who has now been restored through that
23 judicial recusal hearing that this Court allowed to go forward.

24 If I might call -- have Ms. Propes sworn in and call
25 her.

1 THE COURT: I think Mr. Foley would like to make an
2 opening statement too.

3 MS. HUDSON: Sure.

4 MR. FOLEY: Your Honor, just first a correction of a
5 couple factual statements. This suit was filed originally in
6 2005 but we weren't a party to it initially.

7 This lawsuit was originally commenced against the
8 City of Chicago for failing to respond to a 911 call at this
9 residence that burnt to the ground and resulted in the deaths
10 of these children. We weren't brought into the case until two
11 years later.

12 And another factual correction I think, I don't want
13 the Court to be misled with respect to the stipulation about
14 the cost that we've expended.

15 We had never been reimbursed by Thompson, the
16 manufacturer of this television, for any costs we've expended.
17 They have never taken up the defense. We tendered the defense
18 to them. They've always denied the claim which is why we had
19 to file the dec action which is Exhibit C. So I just wanted to
20 make that clear, Your Honor.

21 And the other issue that I'm concerned about is I
22 don't know that it's appropriate for counsel to testify to the
23 Court about what's going on in the Chicago litigation. If she
24 wants to make an argument or advise the Court as to what the
25 proceedings are, I guess that's appropriate. But to take

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1 testimony --

2 THE COURT: Well I'm going to allow Ms. Hudson to
3 call her witness.

4 MR. FOLEY: Okay.

5 THE COURT: And if you have specific objection to any
6 of the questions that are asked --

7 MR. FOLEY: Okay.

8 THE COURT: -- if they're outside and don't qualify
9 under the rules of evidence, you can make your evidentiary
10 objection.

11 MR. FOLEY: Thank you, Your Honor.

12 THE COURT: Ms. Hudson, you may proceed.

13 MS. HUDSON: Thank you, Your Honor. Ms. Propes.

14 MS. PROPEs: Good morning, Your Honor. Where would
15 you like me? Oh, okay.

16 THE COURT: Ma'am, would you stand right there next
17 to the marshal?

18 MS. PROPEs: Oh, stand right here. Okay. Now I see
19 why my witnesses get this confused.

20 THE COURT: Yes.

21 LORNA PROPEs, MOVANT'S WITNESS, SWORN

22 DIRECT EXAMINATION

23 BY MS. HUDSON:

24 Q Ma'am, please state your name for the record and spell
25 your last name.

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1 A My name is Lorna Propes, P as in Paul, r-o-p-e-s.

2 Q Ms. Propes, what is your role in the Funches and Olloway
3 litigation in Cook County?

4 A My firm represents Cynthia Olloway who is the mother of
5 one of the children who died in the fire.

6 Q And when did you become involved in that litigation?

7 A Well it would have been some time within several months
8 after the fire that was in 2004.

9 Q And you ultimately drafted the complaint and amended
10 complaints and brought suit against the parties that have been
11 represented today?

12 A That's correct. The Funches family is represented by
13 attorney Dan Bederman. He and I are co-counsel on the case.
14 There are no claims between the Funches and the Olloways, but
15 we are co-plaintiffs going forward against the three
16 defendants.

17 Q And what counts relate to Circuit City specifically in the
18 Funches and Olloway matters?

19 A Well there are three defendants. The City of Chicago is
20 one defendant and on willful and wanton conduct claims
21 essentially. Thompson which is the manufacturer of the RCA TV
22 and Circuit City from whom the Funches family purchased the TV
23 are defendants in the product liability claims.

24 The particular claim against Circuit City at this
25 time is (1) that they sold the television to the Funches family

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1 and (2) that they repaired the television in such a way as to
2 exacerbate the defect or fail to fix the defect in the TV.

3 Q And how do those two claims relate to the wrongful death
4 and survival action?

5 A In Illinois in the case of a death of an individual claim
6 can be brought pursuant to our wrongful death statute where the
7 people who have the right to recover are the heirs of the
8 deceased.

9 The survival claim is recovery of the deceased
10 person's estate for the person's conscious pain and suffering
11 during their lifetime.

12 So in some ways the same people recover but it's a
13 different avenue of recovery. One is for wrongful death, one
14 is a recovery through the estate for the survival claims of the
15 deceased person.

16 And those claims in this instance and the claims
17 against Thompson and Circuit City, both the wrongful death and
18 the survival claims are based on product liability theories.

19 The case against the City is also for wrongful death
20 and survival, but it's based on willful and wanton conduct. In
21 other words a higher form of negligence which has to be because
22 of the law in Illinois which indemnifies the City for
23 negligence.

24 Q And how I mean you've heard me, Ms. Propes, try to explain
25 to the Court inartfully how joint and several liability works.

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1 But amongst multiple tortfeasors what is the process in
2 Illinois?

3 MR. FOLEY: Your Honor, at this point I'm going to
4 object based upon relevancy. This is really just explaining to
5 the Court the state of the law in Illinois. I'm not sure it's
6 appropriate to have a lawyer --

7 THE COURT: I'm not sure how it's relevant either but
8 I'm going to allow Ms. Hudson a little bit of leeway to tie it
9 up.

10 MS. HUDSON: Thank you, Your Honor.

11 Q Please explain how a joint and several liability --

12 A I'll explain it specifically, Your Honor, with respect --
13 not to the City but to Thompson and Circuit City which is what
14 I think Ms. Hudson's trying to get me to address here.

15 And that is that under our joint and several
16 liability rules, if any one of a number of defendants is found
17 more than 25 percent liable by the jury, then they are jointly
18 and severally liable for the plaintiff's injuries.

19 That means that the plaintiff then has the option to
20 execute on the judgment against any of those found jointly and
21 severally liable.

22 If an entity, let's say Circuit City here, were found
23 to be jointly and severally liable, if they had no money, if
24 they were judgment proof, which in this instance of course they
25 never would be because they have \$170 million in liability

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1 coverage out there, we could choose to execute against Thompson
2 or against the City and not execute against Circuit City at
3 all. So that's one thing.

4 If Circuit City were found just simply severally
5 liable, that is under 25 percent but some liability under 25
6 percent, then that portion of that judgment could only be
7 executed, we could only execute against Circuit City for their
8 let's say 15 percent.

9 If they were judgment proof, if they didn't have \$170
10 million in insurance coverage, then we probably just wouldn't
11 execute on that portion of the recovery if it could not be paid
12 by them.

13 But when you tip into the joint and several liability
14 category, then again we would have the option of executing
15 against anyone.

16 The problem that we face here and that we bring to
17 this Court today is not a matter of executing on a judgment
18 which we do not yet have, it's a matter of moving the
19 litigation forward.

20 So what's happening with the stay is that it's
21 keeping us from moving this complex litigation forward against
22 the other two defendants.

23 Now it shouldn't keep us from moving forward against
24 the City, but the City is fighting us tooth and nail on that
25 every inch of the way and as Ms. Hudson remarked we will have

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1 another hearing on that tomorrow.

2 But it does keep us from moving forward against
3 Thompson because there's a commonality of issues between
4 Thompson and Circuit City, that is the defect in the TV.

5 Q Ms. Propes, with respect to the posture of the case on
6 November 10th when the stay went into effect, where are you in
7 the litigation chain or chronology?

8 A Well we have -- the litigation has been complex
9 particularly against the City. And most, I will say that most
10 of the discovery work has revolved around the City up until
11 now, Your Honor, and indeed we've taken between 50 and 60
12 depositions in the case, countless discovery motions, motions
13 to compel, even motions for sanctions have been brought against
14 the City.

15 And so it has been a very hard fought litigation.
16 Nevertheless a great deal of work has been done.

17 The very next step in this process is for us to do a
18 inspection by an electrical engineer of the television, of the
19 remains of the television set and the other electronics that
20 were there.

21 The initial fire department inspections and
22 inspections done by our experts revealed that the origin of the
23 fire was at the television set.

24 So now the question is what is it about the
25 television set if anything that actually caused the fire. So

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1 that's where we are.

2 We had this inspection set I want to say it was
3 January, February. The stay came along and we weren't able to
4 do that. We now have it set for April 1st, 2nd, and 3rd I
5 think we have those dates set aside. Not that it will
6 necessarily take three days.

7 But that inspection is critical to us moving forward
8 in the case even, Your Honor, for our own analysis of the case
9 and our own development of our experts and our theories. We
10 can't move forward until our expert can examine this artifact.

11 And I heard Mr. Foley makes some -- may I proceed
12 with this, Ms. Hudson, about the testing?

13 THE COURT: I think it would be appropriate if you
14 answer questions --

15 THE WITNESS: Okay, I'm sorry.

16 THE COURT: -- that your counsel asks.

17 THE WITNESS: Yeah.

18 Q So you're at the point of a rescheduled testing and you
19 have conducted discovery, is that correct?

20 A Yes, we have, a great deal of discovery.

21 Q And does Circuit City have counsel in Cook County?

22 A They do.

23 Q What is their counsel team composed of?

24 A Well they have a firm that represents them, a lawyer who
25 comes to court and an associate that comes to court sometimes.

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1 Q Is it one lawyer?

2 A Usually there's one lawyer in court for Circuit City.

3 Q And what is his or her name?

4 A Mr. Vocolla (phonetic).

5 Q And up to the point of the stay in November did Mr.

6 Vocolla participate in the litigation and defense of Circuit

7 City?

8 A Sure, he did.

9 Q Is there a dec action now between Circuit City and
10 Thompson for this indemnification and defense?

11 A Actually I should say that Thompson filed a third party
12 complaint for contribution against Circuit City. Circuit City
13 in turn has filed a third party complaint for contribution
14 against Thompson and this only controls how they between
15 themselves have to pay any judgment.

16 But Circuit City has also alleged in their
17 counterclaim against Thompson that Thompson has an insurance
18 policy which by the terms of their vendor agreement Thompson
19 was required to provide for Circuit City.

20 Circuit City has tendered their defense to this
21 insurance company that Thompson provided. They've denied it.
22 So Circuit City not only has made in their counterclaim for
23 contribution the claim that Thompson breached the agreement to
24 provide insurance which obviously impacts this, but they've
25 also filed a declaratory judgment action seeking to force

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1 Thompson's insurance company to indemnify and defend them as
2 they most likely should be doing.

3 And that, and of course that is outside of any issue
4 that I guess would be involved.

5 Q Ma'am, are both the dec actions and the third party
6 complaint between Thompson and Circuit City stayed at this
7 point?

8 A Everything -- well yes. I mean the litigation -- I guess
9 so.

10 Q Are there any issues in the Cook County complaint that do
11 not involve exclusively Illinois state law?

12 A No, ma'am.

13 Q Is there any expertise needed of a bankruptcy court on any
14 matters in the Cook County complaint other than on education of
15 the scope of the automatic stay?

16 A Only to convince our trial judge that it doesn't apply to
17 the City or to Thompson for that matter.

18 Q Are there any federal counts in any --

19 A No.

20 Q -- of the complaints?

21 A No.

22 Q Or as amended?

23 A No.

24 Q Where are the witnesses located for this litigation?

25 A Well all of the witnesses are located in Chicago.

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1 Q Where are the parties existing and the Funches and Olloway
2 families located?

3 A The Funches and Olloway families all live in Chicago. All
4 of the firemen, all of the call takers for the City, all of the
5 City employees, everyone, lives in Illinois, the Chicagoland
6 area.

7 Q And where is the Circuit City repairmen or servicemen or
8 service call person located?

9 A Illinois.

10 Q Is there any counsel involved in the litigation in Cook
11 County from outside of Illinois?

12 A Not that I've ever met, seen or heard of.

13 Q And where are the files at the court located and this
14 evidence from the -- that's been removed from the house? Where
15 is that located?

16 A Well we have the artifacts that were removed from the
17 house are being kept at a company that's an expert type of
18 analysis company and they have a warehouse. And we pay them
19 \$1,000 a month to store the artifacts.

20 And the, you asked about the files, well every law
21 firm has their own files. The City has voluminous documents
22 and files. I mean all of that's in Chicago.

23 Q And the court files, ma'am, where are the court files?

24 A Oh, the court files are in the Circuit Court of Cook
25 County.

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1 Q Is there any concern amongst the Funches and Olloway legal
2 teams about the ability to have witnesses who have not yet been
3 deposed remain in the area and to be able to locate them
4 specific to Circuit City?

5 A Well there's the general trial lawyer's concern that the
6 longer a case goes on the less available witnesses and evidence
7 are to you.

8 Q Would it be practical in your estimation to transfer that
9 litigation to Virginia to a district court in the Eastern
10 District of Virginia?

11 A Well I think it would not be practical for the cost alone
12 and the wear and tear on the lawyers and the witnesses and
13 everyone that's located in Illinois. It would cost hundreds of
14 thousands of dollars of litigation costs alone to -- for the
15 lawyers to maintain the litigation in Richmond.

16 And that ultimately gets passed along to the clients
17 of course.

18 Q Do you seek, meaning on behalf of the Funches and Olloways
19 today, ma'am, any collection of sums now that Circuit City may
20 ultimately be found liable for?

21 A No. We want to move ahead with the inspection and move
22 ahead with the litigation.

23 Q Do you understand that a further motion or order would
24 have to be filed with the court in order to do that sort of
25 collection?

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1 A Yes, I do.

2 Q Is there a jury trial request in this litigation?

3 A Yes.

4 Q And has it been opposed or challenged --

5 A Oh, no.

6 Q -- in any way?

7 A No.

8 Q Are any Circuit City management or high level employees or
9 is anyone from Circuit City corporate involved in the
10 litigation that you are aware of in Cook County?

11 MR. FOLEY: Your Honor, I'm going to object to the
12 question, lack of foundation. I don't know how she would know
13 who at Circuit City is involved in managing this litigation or
14 has been.

15 THE COURT: Objection sustained. Please set a
16 foundation.

17 MS. HUDSON: Withdraw the question, Your Honor.

18 Q Ma'am, you've heard me speak about the what we're calling
19 the inspection or the examination. Can you explain to the
20 Court why it is considered destructive or what about it is
21 irreparable once conducted?

22 A The inspection is planned to be conducted by our expert
23 electrical engineer. The TV is all melted down. There's an
24 interest in seeing -- determining certain things that might be
25 inside of it. I know one of the things is fuses.

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1 And the plan is to examine this as carefully as
2 possible. But it's going to have to be taken apart in some
3 ways, this blob of plastic, in order to see what's inside of
4 it.

5 The way this works with these experts is that they
6 will be there and they will all agree to what they do next. So
7 there will be an expert for Thompson there for sure and his
8 expert and our expert will agree well move that piece, move
9 this piece.

10 It will all be videotaped, it will all -- there will
11 be, every second of it will be photographed. And then the plan
12 is to x-ray these components as they're able to tease them out.

13 Now nothing will be destroyed in the sense of
14 destroyed although it will be rearranged somewhat because it's
15 a matter of trying to take off the cover, something's melted
16 you know, and get behind it.

17 These things are done very scientifically. These
18 experts work together all the time. And that is the reason
19 they're doing it, largely to see the inside of the TV and see
20 these components.

21 That's the plan. Should I go on about the cost?

22 Q No, ma'am. With respect to the inspection. When we were
23 trying to negotiate with Circuit City prior to today's hearing
24 did you or members of your firm develop a protocol or a project
25 sheet of the scope and nature of what's proposed in that

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1 testing?

2 A We did that at your request. We created a protocol that
3 would describe for the Court and everyone involved here the
4 testing that was to be done.

5 Q And did that protocol set forth the approximate out of
6 pocket cost to all of the parties?

7 A Yes. Each party would pay their own expert --

8 MR. FOLEY: Objection, Your Honor, I don't know how
9 they would know what the cost would be to all of the parties if
10 they decided to participate. It depends on what the party, the
11 level of participation each party decides to do.

12 So we would object to the question as somehow
13 establishing what the appropriate cost would be to do this
14 testing.

15 THE COURT: Again I think you need to provide a
16 foundation for how it would know.

17 Q Ma'am, are there any costs involved in the protocol that
18 are generic or common to all parties?

19 A Yes. As I said each party would pay their own expert and
20 I would have no way of knowing what the other defendant's
21 experts would cost. However Alloyweld, A-l-l-o-y-w-e-l-d, is
22 the facility where this will take place and they charge \$75 per
23 hour for use of their facility. Additionally they charge \$25
24 for every digital x-ray that is taken.

25 We proposed that this be shared proportionately, that

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1 the daily cost be shared proportionately by all the
2 participants. However we, the plaintiffs, will bear Circuit
3 City's proportionate share of this if we are allowed to go
4 forward with it.

5 Secondly the digital x-rays, any party who wants
6 them, they can order them and pay their proportionate share of
7 it. If there's a cost just for doing the digital x-rays just
8 for taking them, we will bear Circuit City's proportionate
9 share.

10 If Circuit City wants the pictures from the digital
11 x-rays some point in time later on down the line, they can say
12 we want three, we want 300, and have them themselves. But they
13 don't need that, you know that's not needed at this time.

14 Anything that this facility charges will be split
15 between the plaintiff, Thompson, and Circuit City and we'll pay
16 their part in order to be able to go forward with it, Your
17 Honor.

18 Q So --

19 A And can I say one other thing about this?

20 Q -- with the exception of those facility costs and perhaps
21 making of x-ray costs, is it your understanding that the only
22 other costs applicable to the parties are the costs of their
23 experts and/or counsel if they choose to have them participate?

24 A Right. An expert can be there, but they don't need to be
25 there because as I said it is all recorded in the reports, the

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1 x-rays, the videotape. And counsel doesn't need to be there at
2 all. I mean I've been at a lot of these and I know that
3 counsel sits on the side and sends messages on their
4 Blackberries. So counsel doesn't need to be there --

5 Q What is --

6 A -- but they could be.

7 Q -- what is the cost estimated to the Funches and Olloways
8 of the testing for one to three days?

9 A What is our expert charging us?

10 Q What is the comprehensive cost of expert facility and
11 should there be a charge for the creation, not ordering of
12 x-rays, an approximation?

13 A Well I'm not, at this moment I don't exactly remember what
14 our expert is charging us. But I can tell you from my
15 experience this is going to cost between five and ten thousand
16 dollars for us to do this. I would imagine our cost.

17 Because our expert is taking the lead on it, he's the
18 one that's doing it, it will cost us money. It would be
19 certainly substantially less for the onlookers I should think.

20 Q With respect to the Funches and we've spoken about the
21 impacts of the litigation on counsel and on the other
22 defendants, but with respect to the Funches and Olloway
23 families, what is the impact of the stay from November 10th,
24 2008 to the present and if it were to continue for the life
25 span of this bankruptcy case?

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1 MR. FOLEY: Objection. I'm not sure I understand the
2 question. What is the effect of the automatic stay?

3 THE COURT: Please rephrase --

4 MS. HUDSON: I'll rephrase.

5 THE COURT: -- the question.

6 Q Ms. Propes, how is the automatic stay and the inability to
7 proceed with a wrongful death litigation in Cook County
8 impacting the Funches and Olloway families?

9 A It impacts the litigation and to the extent that anything
10 that impacts the litigation impacts them. You know it means
11 that we can't move the case forward, it means that witness's
12 memories get stale, it means that it costs us more to maintain
13 the artifacts.

14 It just means we can't move forward. And I think
15 that not moving forward is to deny them justice. And I -- and
16 for those reasons it's been a long time. We've lost time
17 because of the stay, we've lost time because of the motion for
18 substitution of the trial judge.

19 And we are now on a track and an aggressive one to
20 move the case forward. We are looking to try to have a trial
21 by the end of this year. And that's our plan and we're hoping
22 that we can do it and we need to be able to move forward with
23 this inspection and move forward with the case.

24 Q And with respect to the Funches and Olloway members or
25 surviving members of the family personally, what are the

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1 impacts of the stay if you can speak to that?

2 A Well I think they like any litigation they want, you know
3 it's an overused word, but closure and they want it to be done.
4 They want compensation. They want their day in court. And to
5 deny that is it's excruciating for them actually.

6 MS. HUDSON: Nothing further of this witness, Your
7 Honor.

8 THE COURT: All right. Thank you, Ms. Hudson. Cross
9 examine.

10 CROSS EXAMINATION

11 BY MR. FOLEY:

12 Q Good morning, Ms. Propes, how are you?

13 A Good morning, Mr. Foley.

14 Q You mentioned in your testimony that there were some 50
15 depositions taken in this case?

16 A Yes, sir.

17 Q Isn't it correct that those relate to the action against
18 the City?

19 A Oh, yes. I thought I made that clear.

20 Q Okay.

21 A Many of them do. Now there are some which related to
22 firemen and things that could be said to relate to cause and
23 origin of the fire.

24 Q Okay.

25 A But none directed to the product liability case --

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1 Q Okay.

2 A -- that's correct.

3 Q I just wanted to make that --

4 A Yes. That's right.

5 Q -- clear that there hasn't been a whole lot of discovery
6 on the products liability case at all.

7 A No, there has not.

8 Q Okay. And in fact this litigation proceeded solely
9 against the City for the first two years, isn't that correct?

10 A I don't know that it was quite two years, but if you can
11 tell me the exact date that the amended complaint was filed,
12 then that's how long it would be.

13 Q But it was more than a year.

14 A I know that the original case was filed in March of 2007.
15 I don't know when the first amended complaint was filed.

16 Q And it is correct is it not that you could proceed against
17 the City obviously on your claims without any relief from this
18 Court any time that you would like?

19 A Well it is correct that if we dismissed Thompson we would
20 have to voluntarily dismiss Thompson to do that.

21 Q No, no. The question was whether you can proceed against
22 the City.

23 A We have a case that is both defendants and all three.

24 THE COURT: Ma'am, please, just answer the question.

25 A We could not do that without voluntarily dismissing

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1 Thompson and Circuit City which would impact our case going
2 forward because we would only have a certain amount of time to
3 bring it back. That's all I can --

4 Q Okay. Have you filed -- have your clients filed a proof
5 of claim in the bankruptcy case?

6 A I understand I think Ms. Hudson would --

7 Q Is handling that?

8 A Is handling that.

9 Q Okay. Is it also correct that the fire department for the
10 City of Chicago has determined that they cannot determine the
11 cause of the fire at this point in time?

12 A They have -- no. They haven't said that the TV has caused
13 the fire if that's what you're getting at.

14 Q They have not said -- they have not determined what the
15 cause of the fire is?

16 A The cause of the fire is undetermined.

17 Q Undetermined.

18 A They have not done that kind of analysis.

19 Q Okay.

20 A They haven't examined any of the artifacts. They know the
21 origin of the fire.

22 Q Well actually isn't -- they have not determined -- well
23 explain what you mean by the origin.

24 A The origin of the fire is in an area of the room like the
25 northeast corner where the TV and these other electronics were

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1 located.

2 Q So by origin you mean the room in which --

3 A Yes.

4 Q -- the fire started, not that it started in a particular
5 appliance or anything like that?

6 A That's true.

7 Q Okay.

8 MR. FOLEY: I have no further questions, Your Honor.

9 THE COURT: All right. Thank you. Any redirect?

10 MS. HUDSON: No, Your Honor.

11 THE COURT: All right. You may step down, Ms.

12 Propes.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Do you have any other witnesses?

15 MS. HUDSON: No, just closing argument, Your Honor.

16 THE COURT: Okay. I'll hear your closing argument.

17 MS. HUDSON: As Your Honor is aware, the test for
18 lifting the stay under a motion for relief to proceed in
19 existing pre-petition state court litigation as for cause under
20 362(d) and cause unfortunately is not defined in the code so
21 it's a discretionary test on a case by case basis and we look to
22 case law for those factors.

23 And fortunately we do have a balancing test in the
24 fourth circuit that looks to the prejudice of the debtor in
25 lifting the stay versus the prejudice to the litigants or the

1 movants in not lifting the stay for that determination of the
2 amorphous term cause.

3 And the fourth circuit factors are set forth in the
4 Robbins case of 1992, the lead case on this matter. And those
5 factors are whether issues in the pending litigation involve
6 only state law so that the expertise of a bankruptcy court is
7 unnecessary, whether modifying the stay will promote judicial
8 economy, whether there would be a greater interference with the
9 bankruptcy case if the stay were not lifted because matters
10 would have to be litigated in bankruptcy court, and whether the
11 estate can be properly protected by requirement that the
12 creditors seek enforcement of any judgment through the
13 bankruptcy court context.

14 Returning to that first factor of whether or not the
15 pending litigation involves only state law, you've heard my
16 proffers and Ms. Propes's testimony today that has been
17 undisputed that these issues are vanilla state law, wrongful
18 death, and survivorship under the sounding and the causes of
19 strict liability and negligence in Cook County.

20 With respect to the second factor or promoting
21 judicial economy and what exactly is meant by judicial economy,
22 admittedly we have to drill down into the case law and you've
23 heard Ms. Propes testify this Court about the nature and impact
24 on the witnesses, on the parties, on the counsel, on the Court,
25 on the judge that's now been permitted and has survived if

1 that's the right term a recusal motion, Judge Egan, and is
2 presiding over the case again.

3 And where the files and the evidence are located,
4 where these artifacts are being stored, the familiarity of the
5 Court, the aspect of the defense of Circuit City there through
6 attorney Vocolla, and the nature of the expenses to the party
7 and the convenience to the party in where all of the nexus of
8 the litigation has been proceeding since that time of the fire
9 in September of 2004 as well as the very real probability with
10 Circuit City employees scattering and the nature of those very
11 employees that they may not be available later down the line
12 and certainly that memories will fade.

13 With respect to the third factor about whether or not
14 there's a greater interference because the matter would be
15 tried in bankruptcy courts, 28 U.S.C. 157 handles that for us
16 because we can't have this trial in bankruptcy court nor under
17 502 can we reduce this to some sort of claims adjudication
18 process.

19 Filing a proof of claim for \$200 million and having
20 this estimated here because Congress has clearly said it's not
21 appropriate to do any kind of estimation, it's not appropriate
22 to reduce to judgment anything in the wrongful death and in the
23 tort carve out under that bankruptcy legislation.

24 It needs to go to the district court here or it needs
25 to go to the district court in that forum, foreign forum or the

1 Court has discretion to keep it in the state court and abstain
2 discretionarily as we are requesting this Court to do.

3 And in Robbins that Court did indeed find that the
4 stay should be lifted because it was an equitable distribution
5 case that involved interpretation of Florida law. Florida
6 courts were familiar. There were no bankruptcy court issues.
7 The bankruptcy court should grant deference to the state court
8 and it could be more conveniently and quickly done there and
9 the state could be -- the bankruptcy estate could be protected
10 because you could come back for collection to the bankruptcy
11 court.

12 The other factors that have been gleaned from other
13 cases in the fourth circuit or whether or not a state court
14 action has actually proceeded instead of having a demand and we
15 have that here. It commenced in 2005, arguably later against
16 Circuit City, but there's no argument that it's pre-petition
17 several years.

18 We also have counter and cross motions involving
19 Circuit City and some filed as recently as July of this year.
20 But those are entwining Thompson and Circuit City in a way that
21 it's not practical, and Ms. Propes has testified, to proceed
22 against non-debtor parties.

23 And you've heard her testify about the vociferous
24 defense at every step of the way and my proffer that even
25 tomorrow there's another hearing on the applicability of the

1 stay to the City of Chicago. And this Court in --

2 THE COURT: Haven't I already entered an order that
3 said that they can go forward?

4 MS. HUDSON: You did, Your Honor, a comfort order and
5 even offered to educate chambers and provide a telephone number
6 and there is still confusion about the parties. I understand
7 from Mr. Foley that they're contacting him as well.

8 Try as we might parties here in Virginia are trying
9 to educate those in Cook County and it's falling apart.

10 The other factors are whether or not there's a jury
11 trial. It's indisputable that there's a jury trial and that we
12 can't have one here and the discovery is in progress. Maybe
13 we're arguing about how far discovery is along, who discovery
14 involves, whether or not it's been very much in depth against
15 Circuit City at this point.

16 But discovery is underway. It's not like this suit
17 has just been filed on the eve of or bankruptcy was filed right
18 after the suit was commenced. And that the claims are based
19 entirely on state law and can be appropriately and
20 expeditiously determined there.

21 You've heard Ms. Propes testify that they are going
22 to seek a trial date and she believes that this can happen by
23 the end of this year 2009.

24 Also the nature of the automatic stay and Congress
25 returning to the broad application of the automatic stay, under

1 362 we have congressional and legislative history that says
2 even despite that broad application that there are instances
3 when it is appropriate to lift it and one of those instances is
4 when it's more appropriate to permit a proceeding to continue
5 in its place of origin when there's no great prejudice to the
6 bankruptcy estate that would result and in order to leave the
7 parties to their chosen forum and relieve the bankruptcy court
8 from the duties involved in the case so that it may be handled
9 elsewhere.

10 And the Robbins Court found in the exact same
11 instance of litigation of four or five years proceeding in
12 Florida, yes it wasn't a wrongful death it was a divorce case,
13 but that was sufficient to leave it there and keep it outside
14 of the bankruptcy court.

15 And they also addressed this 502 concern of having it
16 somehow allowing the debtors to pick the forum and have a mini
17 trial in terms of a claim objection and said that the Court,
18 for the Court to determine the allowability and amount it would
19 have to study and interpret state law, it would have to review
20 the files of the last four and five years, it would have to
21 replay evidence and all of that would be unnecessary because
22 there is a state court judge who had done all of that and it
23 would be less money to have the proceeding conclude there.

24 So that Court determined that the amount of the
25 claims of the parties to the insurance and the money damages

1 could be determined by that jurisdiction and then in terms of
2 the collection of it and the liquidating of the claim and the
3 bankruptcy that it could be done there.

4 And as Your Honor is very familiar in the AMF case of
5 Stephen Gould Paper, the 2003 case, the Court granted relief
6 from stay there. It didn't allow global relief from stay this
7 Court, it just said to do everything short of collection, but
8 it was the same kind of matter, pre-petition litigation.

9 And the debtors, Your Honor, argued that there could
10 be a proof of claim filed just as Mr. Foley is arguing and that
11 could establish the claim in the case and that it would impose
12 all these time demands on the employees, it would be a drain on
13 their resources, it would divert attention and responsibility.

14 The same kind of arguments that were addressed here
15 and the Court said nothing would be collected without further
16 order of the Court. It would just, the claim would just be
17 liquidated to judgment.

18 And this Court found that any significant prejudice
19 to the debtor caused by its employees being required to oversee
20 counsel's handling of the litigation was minimal at best and
21 any prejudice to the debtor is more than offset by the judicial
22 economy of letting that PI suit in the Gould case continue in
23 Nevada and by the prejudice of the movants in denial of the
24 motion and the probability of the movants succeeding on the
25 merits.

1 And the Court held that because they had not filed
2 that proof of claim at that point that they weren't entitled to
3 -- the movants to blanket relief from stay but that they should
4 have relief from stay to proceed in the litigation outside of
5 the bankruptcy court for determination of liability which is
6 exactly the reduced relief that we seek here today.

7 And the Court did not grant relief to seek and
8 collect against insurance just to reduce -- to liability which
9 again is the exact -- excuse me -- relief that we seek today.

10 And we also have Judge Doumar's case Elliott v.
11 Hardison from Norfolk in the eastern district educating us on
12 another factor of cause and that is when liquidation of the
13 claim may be more conveniently and speedily determined in
14 another forum.

15 To transfer this to the clogged docket in the fourth
16 circuit in the eastern district would certainly set this back
17 to stage one and all counsel would have to transfer and
18 relocate here and not only would it be more expensive on
19 Circuit City, but on the Olloways, on RCA, on Thompson, on the
20 Funches as well.

21 And Judge Doumar wrote that the Court can find no
22 policy in the bankruptcy code that would be fostered by
23 preventing that litigant Elliott from liquidating his claim
24 against Hardison and neither has the Court been shown that to
25 allow Elliott to liquidate his claim would jeopardize

1 Hardison's estate or that reorganization of the estate and so
2 lifting of the stay was appropriate.

3 And lastly, Your Honor, I had argued before about
4 this whole nature of defense costs. The debtor's have said
5 it's going to be very expensive for us to participate in this
6 inspection or even if we have this insurance we have a
7 retention and we have the sophisticated tiering system set
8 forth on this graph and the costs are just too onerous for us
9 to defend this case, let us choose the forum, let us pick the
10 time, let the stay, you know stop everything.

11 Well In Re Todd Shipyards in the district of New
12 Jersey in 1988, PI plaintiffs moved for relief from stay to
13 proceed with multiple PI defendants with state court actions
14 and the bankruptcy court held that the automatic stay would be
15 lifted to allow them to proceed.

16 And the Court actually determined the sufficient
17 cause in terms of the lifting of the stay by conducting the
18 same kind of balancing test. Yes, it's New Jersey not the
19 fourth circuit, but they said the interests of the estate
20 versus the hardship incurred by the movants was that test which
21 is exactly akin to our test in the fourth circuit.

22 And the quote of significance in that case is that
23 absent extraordinary circumstances, litigation expenses do not
24 constitute an injury sufficient enough to justify enjoining
25 litigation of the debtors.

1 That was a wrongful death and personal injury claim
2 as well and said that it had to be tried in forums outside the
3 bankruptcy court and that was 65 different tort actions, 65.
4 Not you know one matter with one attorney Vocolla, but
5 something of a massive extent relatively and the Court in Todd
6 Shipyards allowed that to happen and said that the movants
7 alleged you know the stay would be a hardship on them, they
8 said it would cause them to remain uncompensated for their loss
9 and impact their quality of life and it would impede memory of
10 witnesses and prejudice their chances in ultimately prevailing
11 just as we have here.

12 And the debtors made the same argument there. They
13 made the argument that the damages could be significant, they
14 wouldn't have anything to pay, there would be substantive time
15 and resources that would be drained in defense of the suit, and
16 that they would have to divert their attention away from
17 management and proceeding in the bankruptcy.

18 Granted we're in a liquidation here and not a
19 reorganization, but they said asserting those kinds of costs
20 and those kind of resources in defending the suit would be
21 substantial, expense, and investment and that's true.

22 That's one consideration in the balancing test,
23 conserving those very resources. We admit that. We can't get
24 away from that. We respect the automatic stay. That's why
25 we've had three hearings before Your Honor and we've been

1 negotiating since -- I filed this right before Thanksgiving.

2 But Judge DeVito of the district of New Jersey
3 bankruptcy court said litigation expenses do not constitute an
4 injury sufficient to justify the enjoining of litigation
5 against a debtor.

6 There are cases when potential litigation expenses
7 rise to that level of enjoining it, but those are suits like
8 5,000 suits that are going to endanger the very existence of a
9 debtor, 17,000 claims that would drain the debtor irreparably
10 in AH Robbins, 5,000 suits plus an equal number of pending
11 suits that would consume all assets of the debtor.

12 This is not a case like that. We have 175 million in
13 excess insurance, we're not trying to collect anything, we've
14 stipulated and they've stipulated that they have 326,000 in
15 expenses. If they proceed at that average it's still 60 some
16 thousand a year.

17 We are not at the level of 20,000, 50,000 claims with
18 an arsenal of attorneys and it's just not at the level to
19 exceed that threshold.

20 So courts have regarded also that deference to state
21 court and the opportunity to litigate the issues of liability
22 as something significant and sacrosanct that's protected under
23 28 Section 157 and shouldn't be set aside and that the
24 automatic stay was never intended to preclude that
25 determination of tort liability.

1 True you can prevent the collection and you can make
2 us come back for an orderly distribution in the claims process,
3 but we have to be able to liquidate that to a sum certain and
4 we're prepared to come back to the Court for a motion and an
5 order.

6 And even Congress has you know recognized that with
7 that specific statutory mandate and, Your Honor, there are also
8 cases in Texas such as In Re Fowler where it was an auto
9 accident tort which was -- is not anywhere near the level of
10 what we're going with here, but that case involved insurance
11 and the nature of bills actually exceeding insurance.

12 Well here we have something different. We have
13 deductibles and SIRs before we would reach insurance. But the
14 same kind of issue where it's not dollar for dollar, first
15 dollar insurance and no impact on the debtors because cost of
16 defense and insurance would provide.

17 And that Court said there's no reason to believe that
18 the burden on the debtor would be any more onerous to liquidate
19 the case in state court than to have the reference withdrawn
20 and litigate under federal district court.

21 So you know to say that there should be a claims
22 proceeding that then should be withdrawn to the Eastern
23 District of Virginia is going to make it more expensive even
24 for the debtors themselves.

25 And in the Revco case Murray v. On-Line Business

1 Systems, the adversary proceeding in the Northern District of
2 Ohio of 1989, the debtor there argued that plaintiffs should
3 proceed in district court in a removed action and that some 100
4 claims that existed against them that first the relief from
5 stay should not be granted because it would just be a first
6 step in opening the flood gates anticipating that there would
7 be an unmanageable and unworkable situation and that sort of
8 argument.

9 And the Court said that the administration of that
10 bankruptcy case in Revco would not be prejudiced if the case
11 would be allowed to proceed in state court for final judgment
12 regarding the claims against the debtor if any because the
13 Court could modify the stay to allow the trial to proceed, but
14 prohibit actions to recover.

15 And we're coming to the Court conceding that we won't
16 do that. We just want to reduce to a judgment, to a sum
17 certain.

18 So with -- and also, Your Honor, Judge Shelley's case
19 from 1989 Picklick v. Hudgins (phonetic) and In Re Hudgins
20 (phonetic), he spoke to the congressional mandate in 28 U.S.C.
21 157 and said it was made clear that the issues surrounding
22 personal injury and wrongful death claims are excluded from the
23 jurisdiction of this court and explains succinctly and very
24 clearly that Section 502 provides for an estimation for the
25 purposes of allowance of a claim, whether it's contingent,

1 whether it's unliquidated.

2 But that Section 152(b)(2)(b) prohibits the
3 bankruptcy court from estimating contingent and unliquidated
4 personal injury and wrongful death claims against the estate
5 for distribution purposes.

6 And that 157 says that personal injury and wrongful
7 death cases are to be withdrawn as categories from other types
8 of proceedings affecting the liquidation of the estate and they
9 are not something that the bankruptcy court can entertain.

10 And further that the district court has this very
11 discretion I spoke of to abstain in favor of state courts from
12 hearing those very proceedings. And the power to abstain is
13 something that is discretionary and will only be reviewed as an
14 abuse of that discretion.

15 And finally, Your Honor, in the bankruptcy case of
16 Ice Cream liquidation from the district of Connecticut in 2002,
17 the creditors there had sexual harassment claims against a
18 Chapter 11 debtor and they moved for relief from stay and this
19 very same beast that we're seeking today, discretionary
20 abstention to allow their claims to be liquidated in state
21 court.

22 And the stay was lifted to liquidate those claims to
23 a judgment and a sum certain and they were ordered to come back
24 to the Court under further motion on collection possibly
25 depending on what happens. And they sought that Court to

1 abstain from exercising its jurisdiction in its discretion and
2 to allow deference to the state court who had already been
3 proceeding with those unique state court claims that involve no
4 bankruptcy issues whatsoever.

5 And that Court found it prudent to do the very thing
6 that we're asking this Court to do which is lift the stay for
7 us to continue with the litigation as to all parties, including
8 the debtor, and reduce it to a judgment and come back to this
9 Court for the claims proceeding.

10 And barring that at a very minimum to allow this
11 testing, destructive testing to occur on April 1st through 3rd
12 to the extent that the stay applies just because the very
13 nature of the testing and all of the parties and the
14 interweavings of counts against and defenses and cross claims
15 against one other and the nature of the spoliation and
16 prejudice arguments that could be later mounted by defendants
17 because of the nature of what's done in that testing.

18 THE COURT: All right. Thank you, Ms. Hudson. Mr.
19 Foley.

20 MR. FOLEY: As Your Honor mentioned, this motion has
21 been pending since the beginning of this case which although a
22 lot has happened obviously in this case, it's still only a
23 couple months old.

24 We did consent to Your Honor entering a comfort order
25 to help hopefully convince the judge in Chicago that this

1 matter can proceed against the non-debtor defendants and it can
2 still proceed against the non-debtor defendants, Thompson as
3 well as the City. In fact it proceeded against the City for
4 the first two years of the litigation before we were even
5 brought into it.

6 But the point is here, Your Honor, the motion should
7 be denied because it was filed on a false premise. The false
8 premise is that there is first dollar insurance coverage here
9 and there will be no cost or expense to the estate.

10 It's an undisputed fact now Exhibit A, which is in
11 front of you, that we have a self insured retention of \$500,000
12 and a deductible of \$1.5 million which includes cost of defense
13 that we have to pay out of pocket before any real insurance
14 kicks in.

15 So what we have here is a situation that's really no
16 -- although it's a very tragic event that occurred, it's a
17 tragic claim, cause doesn't exist because the fact that the
18 automatic stay is inconvenient or it's impractical doesn't
19 establish cause.

20 There's no difference between this claimant and any
21 other claimant with a pre-petition claim that would like to
22 have their choice of forum honored and just basically go
23 forward as though the bankruptcy doesn't exist.

24 I mean we're in the middle of the largest retail
25 liquidation in history that Your Honor approved less than a

1 week and a half ago. The staff at the headquarters as you can
2 imagine is a lot smaller than it was a week and a half ago.

3 We have administrative expenses that are accruing in
4 this case. We don't need to spend another \$2 million defending
5 this claim until the insurance, real insurance takes over.

6 Your Honor entered a comfort order again to help the
7 -- convince the judge that the matter can go forward against
8 the non-debtor defendants.

9 I have urged counsel for the movants here to simply
10 dismiss us without prejudice in that suit and at that point
11 there would be no issue that the judge over there could be
12 concerned about going forward.

13 They don't need relief from stay to go do this
14 testing. What they want relief from stay for is to bind us to
15 some result that's occurring over there. That's why they don't
16 want to dismiss us without prejudice. They want to bind us to
17 whatever result will happen in Cook County.

18 They're going to file a proof of claim. You heard
19 the testimony with respect to that. It's deemed allowed until
20 it's objected to. It may never need to be liquidated. If they
21 go forward against the City and they get a judgment, they go
22 forward against Thompson and they get a judgment, they collect
23 everything that they think they're owed.

24 It may never be necessary to try this claim against
25 Circuit City. So why impose upon us, take away the benefit of

1 bankruptcy which is the automatic stay, to make us spend up to
2 \$2 million in defense costs.

3 As Your Honor heard, this case has been pending for a
4 long time and they haven't even gotten started on the products
5 liability aspect of this case yet. They just want to begin
6 that. There's been no determination of the cause of this fire.
7 The first two years of this litigation had to do with the City
8 of Chicago which I understand from counsel for the movant has a
9 history of botched 911 calls for lack of a better word.

10 And you know we do have a lot of claims in this case.
11 You know the claims bar date is not until tomorrow, but as of
12 three days ago we have 6,000 claims already filed in this case.
13 And so we're going to have a lot of work to do in the claims
14 process.

15 One issue that I would like to distinguish is the AMF
16 decision that was referenced. We were counsel for the debtor
17 in that case, Your Honor. That did involve first dollar
18 insurance coverage so although there was inconvenience to
19 witnesses and whatnot, there was no out of pocket expenditure
20 involved in that case.

21 Again, Your Honor, we're in the middle of the largest
22 retail liquidation in the history of the United States and we
23 don't think there's any cause here that's been established. Is
24 the automatic stay inconvenient to these claimants? Yes. Is
25 it impractical to proceed against the other defendants? Maybe.

1 But is it impossible? No.

2 You heard the testimony. They could dismiss us
3 without prejudice. They could go forward against the other
4 parties, file their proof of claim. And if we ever have to
5 liquidate the claim against Circuit City we can do so at a
6 later date.

7 But the only thing that's before the Court is whether
8 cause exists to grant relief from the automatic stay and it
9 doesn't. We would ask the Court to deny the motion.

10 THE COURT: All right. Thank you, Mr. Foley.
11 Anything further, Ms. Hudson?

12 MS. HUDSON: Just briefly, Your Honor. Mr. Foley
13 argues that the motion was filed on a false premise of first
14 dollar insurance and I will concede that at that point it was
15 filed in an expedited manner to preserve a hearing the very
16 next day and some depositions and some discovery sanctions and
17 it was filed hastily on the Wednesday night before
18 Thanksgiving.

19 But it does address as I believe he's now come around
20 to in paragraph eight that this is not a core proceeding
21 appropriate to be litigated and especially of the light that
22 it's been active in another court for some four years.

23 Lifting the stay will promote judicial economy,
24 permit the parties to proceed efficiently. It will not disrupt
25 the bankruptcy process. The state could still be protected if

1 the stay is lifted there may be insurance to fund some or all
2 of the claims and any prejudice would be more than offset by
3 the prejudice incurred by the movants because the litigation
4 would be significantly delayed.

5 So all of these factors and those tests were in the
6 motion and to suggest that it was just filed hey this is a
7 simple insurance piece, let us go forward, the memorandum
8 certainly stretched broadly than that.

9 And to suggest that the only factors that we've been
10 here for hours now today on are inconvenience and
11 impracticability, I don't even think I articulated them in that
12 fashion. But we certainly have ad nauseam gone through far
13 more factors than that.

14 And then finally I'm perplexed, I'm a little bit
15 confused. There's no evidence whatsoever of \$2 million being
16 needed to defend this. He's just suggesting and pulling a
17 number outside of his head.

18 The stipulation is 326,000 since the case has begun
19 several years before and continuing on that pace does not get
20 us from here into the stratosphere of \$2 million. So I don't
21 know --

22 THE COURT: But the discovery is just going to begin
23 now with regard to the product liability portion of the case
24 and what he was referring to was the first \$2 million of
25 defense cost comes out of Circuit City's pocket.

1 MS. HUDSON: And 326,000 of that has already been
2 expended, Your Honor --

3 THE COURT: Well that was pre-petition.

4 MS. HUDSON: -- so that deducts from it.

5 THE COURT: Right now the company's faced with all
6 kinds of administrative expenses in winding down this company
7 and this would be an additional administrative expense. That
8 was the point Mr. Foley was making.

9 MS. HUDSON: And I do understand that, Your Honor.
10 Unfortunately we have a balancing test and it is not practical
11 for us to be able to dismiss Circuit City for the reasons Ms.
12 --

13 THE COURT: I would like you to address that because
14 Mr. Foley made that point about why can't you just dismiss them
15 as a party without prejudice. You could file your proof of
16 claim as he suggests in this court and then if it -- if the
17 claim does need to be liquidated at a later time, you know it
18 could be, but why can't you do that?

19 MS. HUDSON: Well we can't for the reasons that Ms.
20 Propes testified about what's going on between Thompson and
21 Circuit City, the third party action and the counter claim.

22 Us trying to do something just with respect to our
23 rights in them does not affect those two beasts. And Ms.
24 Propes testified as to the intertwined nature in a products
25 liability between all of those people and we have Circuit City

1 probably repairing and servicing the television.

2 They're going to be an indispensable party to the
3 defense of the other defendants and to have a jury trial where
4 the jury's seeing an empty chair for one of those parties --

5 THE COURT: It wouldn't be empty, it would just be
6 gone.

7 MS. HUDSON: Well also this issue of the joint and
8 several liability in Illinois. We need to have a finding of 25
9 percent liability with respect to all of the defendants to be
10 able to collect against any of them and we don't want to be in
11 a situation where this is a case -- I mean we've chosen who we
12 brought into this case and we've survived that scrutiny under
13 state law, it's not to be questioned here, and a bankruptcy
14 would never trump that, enforce a dismissal.

15 THE COURT: I wasn't suggesting that it would force a
16 dismissal. I was just asking why it was imperative to go
17 forward right now.

18 MS. HUDSON: The intertwined nature of the defenses
19 amongst the defendants, the insurance between two of the
20 defendants, the counter claims filed between them for
21 contribution and indemnification.

22 That affects it as well as our theories of the case
23 under products liability.

24 THE COURT: How does contribution claim though
25 between two defendants affect the plaintiff in the case?

1 MS. HUDSON: Well the insurance at issue with
2 Thompson, if that were to fund the defense and any kind of
3 award that Circuit City would be responsible for, we would
4 benefit from that recovery.

5 That's another asset from which we can recover.
6 Those excess insurance policies, anything that we would get on
7 a claim here in this court, and that Thompson policy, and maybe
8 very practically, Your Honor, that Thompson policy and their
9 ability to succeed there if that's strongly grounded in that
10 contract is perhaps the strongest ability for us to recover.

11 And you've heard about how obstreperous the City of
12 Chicago has been and that the majority of the hearings and
13 contested nature have been with them.

14 So our very real probability of recovery could be
15 that Thompson policy.

16 THE COURT: The other thing I would like you to
17 address is why can't you go forward with the examination of the
18 television set on April 1? I thought that the relief that I
19 had granted was also so that you could proceed with that
20 testing.

21 MS. HUDSON: At one point we had proffered that to
22 the Court. But when it came time to actually frame the order
23 that was not part of that relief that was granted in my
24 recollection.

25 But the problem, Your Honor, is we have that test and

1 Circuit City is absent and doesn't participate and their
2 interests aren't aligned with ours or with the others and those
3 experts do what they're going to do, they photograph, they
4 test, they pry, they melt, they saw and Circuit City doesn't
5 participate.

6 Then it comes times to liquidate the claim. They
7 object to it in this court. We can't do some sort of 502
8 proceeding, it's not appropriate to liquidate it here, it's
9 statutorily carved out.

10 We have to go back to that court. How do we with
11 digital x-rays allow an expert to participate coldly from that
12 and recreate everything for them to have -- I'm stepping into
13 the shoes of Circuit City here -- for them to have any
14 meaningful defense?

15 They're going to argue they were prejudiced in not
16 being able to participate, the evidence has been tampered with
17 and has been permanently destroyed or partially destroyed, and
18 there's a spoliation of it.

19 So they're going to argue on it from an evidentiary
20 concern and under state law defenses that they weren't able to
21 participate in this. And the whole thing comes down to cause
22 and origin. Where in the room, which apparatus or appliance,
23 was Circuit City there to repair it, did they have a coolant
24 problem, did the repairman make a mistake, was he the last
25 person in the chain.

1 I'm not trying to step into the shoes of state court
2 attorney here, but all of that is at issue and Circuit City is
3 a major player in that. We can't just say the RCA or the
4 Thompson television set that was sold and then have a major
5 disconnect in the jury's mind to the death of four children in
6 a fire.

7 I mean there is an issue with a defect in this TV or
8 something after the fact in this TV and Circuit City is a major
9 player in that.

10 And that testing is going to show -- we admit, Your
11 Honor, that we may come forward to Circuit City or to Cook
12 County -- excuse me -- and dismiss Circuit City after that
13 testing. The testing is needed on so many grounds, for us to
14 advance against the non-debtor parties and against Circuit
15 City, and for the experts to get whatever they need moving
16 forward in the case.

17 And the expense is nominal of a couple thousand
18 dollars if even. It's not necessary to have every expert there
19 or every attorney there because of the videotaping, but
20 certainly one would have a more meaningful defense being able
21 to participate in that and instruct how that's conducted and
22 glean whatever needs to be safeguarded and preserved for later
23 defense.

24 But it's just not practical to be able to snapshot
25 this and say dismiss this right now almost akin to a non-suit

1 and in six months when we don't exist, our deliveryman doesn't
2 exist, nobody exists in corporate, our counsel's not being
3 paid, let's take this to Cook County and whatever is left in
4 the fallout you guys can liquidate against us.

5 But they can't pick the -- they say we can't pick the
6 forum, they can't pick the forum. This is something that
7 Congress said has to go to state court and be liquidated. And
8 we're not trying to collect and those defense costs --

9 THE COURT: It didn't say it had to go to state
10 court, it said it had to go to district court.

11 MS. HUDSON: Correct, Your Honor, I'm sorry. But
12 discretionarily to abstain it could be appropriate to go to a
13 state court, particularly one of long tenure like Cook County
14 here.

15 And then Your Honor is correct and Mr. Foley is
16 correct that that comfort order was entered but that it did
17 address only going forward with those hearings that have
18 occurred.

19 And tomorrow there is even another hearing on the
20 applicability of the stay to the City of Chicago. So it is
21 obvious that there would be a continued nature to educate this
22 Court and possibly a further comfort order that would need to
23 be entered because they're just not getting it.

24 THE COURT: Well the stay just doesn't apply to the
25 City of Chicago and it doesn't apply to Thompson or --

1 MS. HUDSON: And short of a telephone call, Your
2 Honor, or a conference call, I don't know how other -- I mean
3 they've been contacting myself, they've been contacting Mr.
4 Foley, and they've been contacting my client, and they've gone
5 to multiple hearings about the judge, about discovery, and
6 continue to still say that it does apply.

7 How that's happening in a state court proceeding I
8 don't know. But we are not trying to say that this inspection
9 is some sort of complicated process but because of that need to
10 very clearly articulate the ramifications of the stay and the
11 scope of it, that's why we seek it. And also with respect to
12 the relationship and the significance and the effect on the
13 parties and the codefendants that I've previously argued about
14 is why we seek that from the relief from stay as well.

15 THE COURT: Thank you.

16 MS. HUDSON: Thank you, Your Honor.

17 THE COURT: Anything further, Mr. Foley?

18 MR. FOLEY: Your Honor, just to clarify. The order
19 that we did talk about before, the comfort order, did to the
20 extent it was necessary allowed the parties to go forward on a
21 motion to substitute the judge that's hearing this matter.

22 The City of Chicago wanted a new judge. They thought
23 the judge in place there didn't like them and was prejudiced
24 against them.

25 Another judge obviously heard the substitution of

1 judge motion, denied it, so the City of Chicago is stuck with
2 the same judge that they tried to get rid of.

3 We pre-petition filed joinder papers with the
4 plaintiff opposing the substitution of judge motion because we
5 thought the judge was fine. So that's what went forward. To
6 the extent relief from stay was necessary we were on the same
7 side of that.

8 This testing issue, Your Honor is absolutely right,
9 they can go do the testing any time they want. They don't need
10 relief from stay to do that. They just can't bind us or
11 proceed against us. They want relief from stay to setup I
12 guess some kind of an estoppel argument is what I heard. I
13 don't know.

14 And in the argument that I heard seemed to be
15 inconsistent with the testimony which was this testing is very
16 meticulous and scientific and recorded and pristine and
17 videotaped.

18 So why do we have to participate unless they want to
19 use it as some kind of an estoppel against the estate or
20 something?

21 But again, Your Honor, the answer to this and I think
22 maybe the judge would benefit from some clarity whenever Your
23 Honor rules on this motion. If Your Honor denies it that may
24 provide some clarity. If they dismiss us without prejudice
25 that may provide some clarity.

1 I think the fact that this motion has been pending
2 for two months may have something to do with some of the
3 confusion that's going on in Chicago rather than the Court
4 simply not understanding that the automatic stay only applies
5 to us and doesn't apply to anybody else.

6 But again, Your Honor, for all the reasons we've
7 stated earlier we think the motion is not well founded and
8 should be denied.

9 THE COURT: All right, thank you.

10 All right, the Court has before it the motion for
11 relief from the automatic stay to proceed with the state court
12 litigation. The Court is going to deny that motion.

13 I'm terribly concerned in the balancing about the
14 administrative expenses that this company is going to be
15 incurring as it goes through, as Mr. Foley described it, the
16 largest liquidation in history and those expenses are going to
17 be considerable and all of the efforts having to be put forward
18 by management and all of the current employees of Circuit City,
19 at this time need to be focused on that process and I don't
20 think the Court should burden that process with this additional
21 layer.

22 There are -- this is one of many, many, many claims
23 that have been filed and will be filed against Circuit City and
24 there will be a time in this case when all the claims are going
25 to have to be analyzed and resolved, and to allow this matter

1 to go forward at this point in time would burden the company
2 with potentially \$2 million of additional administrative
3 expenses at a time it can't afford to turn its focus away from
4 what needs to be done.

5 Now, that said, there is nothing about the automatic
6 stay that affects the City of Chicago, or Thomson or any other
7 third party, to litigation. And the litigation can proceed in
8 the state court, just not as to Circuit City. Same thing with
9 testing. A testing can go forward, just not with regard to
10 Circuit City. And, certainly, you know, Circuit City can be
11 dismissed without prejudice if counsel desires. It's not
12 required to do that by the bankruptcy code or the order of this
13 Court. I'm just not allowing the stay to be lifted so that
14 litigation can proceed against it.

15 Any questions with regard to the Court's ruling?

16 MS. HUDSON: No, Your Honor, but if we might request,
17 in light of the confusion in Cook County, a subsequent comfort
18 order that I'd be prepared to address and circulate to Mr.
19 Foley with respect to the inspection. That we could have that
20 entered before that April 1st date, we would appreciate that.

21 THE COURT: I would entertain that. I would like it
22 to be a consensual order. I don't think it would be a problem.
23 I think that, you know, Mr. Foley would be amenable to that as
24 well.

25 MR. FOLEY: No problem, Your Honor.

1 THE COURT: Okay. So, I would entertain that.

2 MS. HUDSON: And, I guess secondly, Your Honor, with
3 regard to the expediency of the hearing tomorrow on City of
4 Chicago's continued motion to have the stay apply as to the
5 litigation, if we would have a consensual reiteration of that
6 comfort order drafted today and presented to chambers in an
7 expedited fashion, would the Court be willing to entertain
8 that?

9 THE COURT: I would take every effort I possibly can,
10 you know. The earlier you can get it to me the better, I'll
11 have a chance to review it and such. But I will try to do
12 that, yes.

13 MS. HUDSON: Thank you, Your Honor.

14 THE COURT: All right. Mr. Foley, is there anything
15 else that we need to take up this morning?

16 MR. FOLEY: No, Your Honor, I think we're finished.
17 Thank you, Your Honor.

18 THE COURT: Okay, thank you.

19 COURT CLERK: All rise. The court is now adjourned.

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C E R T I F I C A T I O N

WE, JANET D. PERSONS and ELAINE HOWELL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of our ability.

/s/ Janet D. Persons

Date: February 2, 2009

JANET D. PERSONS

J&J COURT TRANSCRIBERS, INC.

/s/ Elaine Howell

Date: February 2, 2009

ELAINE HOWELL

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